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IN THE

Supreme Court of the United States

October Term, 1957

No. 496

MICHAEL GALGANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MICHAEL GALGANO,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

Michael Galgano, the Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on the 23rd day of August, 1957.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 245 Fed. 2d —. A copy of this opinion is hereto annexed and marked Exhibit "A" hereto.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit which is sought to be reviewed herein was made and entered on the 23rd day of August, 1957.

No motion for an order requesting a rehearing was made to the United States Court of Appeals for the Second Circuit, nor was any application made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., Section 1254 (1), on the grounds that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit. Certiorari is sought on the grounds that the United States Circuit Court of Appeals for the Second Circuit has rendered a decision on an important question of Federal law in a way in conflict with an applicable decision of this Court and that the United States Court of Appeals for the Second Circuit has sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

Questions Presented for Review

The Petitioner Michael Galgano was convicted in the United States District Court for the Southern District of New York on count 14 of the indictment herein, the sole count charging said petitioner with a crime. This count

charged the Petitioner with the crime of unlawfully, wilfully and knowingly conspiring to violate the Narcotics Law of the United States (Title 26, Sections 4704(a), 4701, 4703, 4724(c), 4771(a); Title 21, Sections 173 and 174; Title 18, Sections 371 U. S. C.). The judgment of conviction of the United States District Court for the Southern District of New York was based upon a verdict of "guilty" by a jury and was dated and entered the 5th day of February, 1957. Under said judgment of conviction, the Petitioner was sentenced to imprisonment for a period of 10 years on said count 14. The questions presented for review with regard to the trial of the aforementioned indictment are:

1. Was the quasi admission of the Petitioner Galgano allegedly made to the witness Botto a co-defendant and co-conspirator named in the indictment, which the said co-conspirator testified to on the trial of this criminal proceeding, corroborated by substantial independent evidence which tended to establish the trustworthiness of said statement or quasi admission?

(a) Was other hearsay testimony of the witness Botto such substantial independent evidence as would corroborate the quasi admission of the Petitioner testified to by this same witness?

(b) Was Government's Exhibit 33 in evidence (10 empty Bankers Trust Co., envelopes found in the home of the Petitioner at the time of his arrest), such substantial independent evidence as would tend to corroborate the quasi admission of the petitioner testified to by the witness Botto?

2. Was error committed by the District Court in admitting over objection, Government's Exhibit 33 in evidence

(10 empty Bankers Trust Co., envelopes found in the residence of the Petitioner at the time of his arrest) and if so, was not this a substantial prejudice to the Petitioner's rights?

Statutory Provisions Involved

Title 18 United States Code.

"§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Title 21, United States Code.

"§173. *Importation of narcotics drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All nar-

cotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotics drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes (Feb. 9, 1909, c. 100, §2, 35, Stat. 614; Jan. 17, 1914, c. 9, 38, Stat. 275; May 26, 1922, c. 202, §1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657."

"§174. Same; penalty; evidence

Whoever, fraudulently or knowingly imports or brings any narcotics drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such

acts in violation of the laws of the United States, shall be imprisoned, not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, United States Code.

Sections 4701, 4703, 4704(a), 4724(c), 4771, 7237(a) (c).

(These sections are not printed in this petition as they refer to the requirement or to payment of taxes and tax stamps for narcotic drugs and no defense of payment of taxes and attachment of stamps to containers has been raised.)

Concise Statement of the Case

This petition seeks to review a judgment of the United States Court of Appeals for the Second Circuit, dated and entered the 23rd day of August, 1957, which affirmed a judgment of conviction of the Petitioner rendered the 6th day of February, 1957, in the United States District Court for the Southern District of New York, which judgment of conviction was based upon a verdict of a jury finding

the Petitioner guilty under Count 14 of the indictment herein, the sole count charging the Petitioner with a crime, a copy of said count is hereto annexed and marked Exhibit "B" hereof. Count 14 of the indictment herein charged the Petitioner along with other co-defendants and co-conspirators with the crime of unlawfully, wilfully, and knowingly conspiring to violate the Narcotics Laws of the United States (Title 26, Section 4704(c), 4701, 4703, 4724(c), 4777(a); Title 21, Sections 173 and 174; Title 18, Section 371 U. S. C.). Under the aforementioned judgment of conviction, the Petitioner was sentenced to 10 years imprisonment.

An outline of the proof offered at the trial concerning the Petitioner is as follows:

The testimony of Thomas Dugan, a Government agent insofar as it related to the Petitioner Galgano was that agent Dugan arrested Galgano at his home on November 19, 1956 (34a).* At the time of his arrest, the Petitioner Galgano was at home with his wife and two children (36a). Agent Dugan testified that he found ten empty Bankers Trust Co. envelopes on the living room table of Galgano's home (35a). No narcotics, glassine envelopes or the like were found either at Galgano's home or on the person of the Petitioner Galgano. The empty Bankers Trust Co. envelopes which were ten in number were received in evidence over the Petitioner's objection and marked Government's Exhibit 33 (35a). On being questioned by agent Dugan at the time, both the Petitioner and his wife stated that their children brought the envelopes home and that

* Numerals in parentheses followed by letter "a" refer to numbered pages of the Petitioner's Appendix on his appeal to the United States Court of Appeals for the Second Circuit.

they used them for taking school and lunch money to school (39a-40a).

An additional statement given by the Petitioner Galgano to Government Agents was read into the trial record by Susan Caporaso, a Government stenographer who read from a transcript of a statement given by Galgano to the Government, which transcript was marked Government's Exhibit 36 (42a). In this statement, the Petitioner merely stated that he is married, has two children, ages 7 and 13 and was known, in addition to his regular name, by the nick-name "Black Mike" (43a).

By stipulation between the parties, another statement given by the Petitioner on November 19, 1956, was read into the record of the trial (45a). In this statement, the Petitioner denied knowing the witness Michael Botto by photograph or name (46a). The Petitioner, however, stated that in about the middle of October, a fellow named Blackie just out of jail, came into the bar drunk, that he asked for Galgano and tried to make trouble and that Galgano took this fellow by the collar and threw him out of the place (47a).

Aside from the aforementioned statements read into the record and the testimony of agent Dugan theretofore mentioned, the sole witness against the appellant Galgano was one Michael Botto, named as a co-defendant in this indictment, who has already pleaded guilty to the charge against him (R. 355).* According to Botto's own testimony, he, Botto, has a long criminal record which includes conviction on three felony charges (R. 270-272).

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* Numerals in parentheses preceded by the letter "R" refer to page number of documents in the record on appeal to the United States Court of Appeals for the Second Circuit.

The Government witness Botto is a self-admitted narcotics peddler who did business with Ralph and Sal Russano (8a-12a), co-defendants who were named in the indictment, but whose trial was severed from that of the Petitioner and who were described by the Court in its charge as being the prime movers in the conspiracy (66a).

The Government witness Botto testified that he met the Petitioner Galgano two or three times at the most (31a), once in either July or August of 1955 (31a) and the other time, the date that he was released on bail on the present charge which was October 16, 1956. At the time of the meeting on October 16, 1956, Botto claimed an alleged conversation with the Petitioner Galgano as follows:

"Q. And where did this conversation take place? A. The Delmont Bar.

Q. Where is the Delmont Bar? A. Around 180th Street and Third-Hughes Avenue, some place around there.

Q. Do you see here in court the man with whom you had this conversation? A. The second one from the left.

Mr. Londin: May the record indicate that the witness has identified the defendant Michael Galgano?

Q. And did you discuss narcotics with Galgano? A. I did.

(335) Q. What did you say to Galgano and what did he say to you about the narcotics? A. I told him that I was paying $400 an ounce for the stuff that he was giving to Ralph.

Mr. Fusco: That is objected to.

Q. Exactly what did you say to him, sticking as carefully as you can to the language of the conversa-

tion. A. I told him I was buying narcotics from Ralph and paying $400 an ounce, and that Ralph had told me 'He was getting it from you.'

He told me that when he gave the stuff to Ralph the stuff was all right" (29a).

The testimony of Botto concerning the October 16, 1956, conversation was contradicted by the statement of the Petitioner Galgano quoted by agent Dugan in his testimony wherein Galgano stated that he took the individual named Blackie by the collar and threw him out of the bar.

Martha Bridges, a barmaid employed at the Delmont Bar testified for the Petitioner. Martha Bridges corroborated the statement of the Petitioner Galgano read into evidence wherein she stated that she saw the Petitioner Galgano order Botto out of the bar and that Botto left (76a).

The above outline covers the proof offered at the trial concerning the Petitioner Galgano. None of the other witnesses who testified for the Government mentioned the Petitioner Galgano either directly or indirectly.

The Petitioner did not testify on the trial herein.

Basis for Federal Jurisdiction in the Court of First Instance

The basis of Federal Jurisdiction in the Court of first instance was that the crime charged was conspiracy to receive, possess and sell heroin in violation of Federal Narcotics Law (21 U. S. C., Sections 173, 174; 26 U. S. C., Sections 4701, 4703, 4704(a), 4724(c), 4771(a)). All in violation of Title 18, U. S. C., Section 371.

Reasons Relied on for the Allowance of the Writ of Certiorari

The basis of this application is that the United States Court of Appeals for the Second Circuit by its judgment of affirmance dated the 23rd day of August, 1957, which affirmed the judgment of conviction of the Petitioner rendered by the United States District Court for the Southern District of New York on the 6th day of February, 1957, decided an important question of Federal Law in a way in conflict with an applicable decision of this Court and has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

The particular decision of this Court that it is claimed the opinion and decision of the United States Court of Appeals for the Second Circuit are in conflict with is *Opper* v. *U. S.*, 348 U. S. 84, 99 L. Ed. 101, 75 S. Ct. 158. In the *Opper* case where this Court affirmed a conviction for violation of 18 U. S. C., Section 281, this Court reviewed the law regarding corroboration of confessions and admissions. In the *Opper* case the alleged admissions were made to F.B.I. Agents and this Court after stating that the admissions of the accused were of the same character as confessions and required corroboration went on to state at page 93 as follows:

> "However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement."

A review of the evidence of the trial in the present case and the opinion of the United States Court of Appeals will show that the so-called quasi admission consisted of testimony of the witness Botto, named in the indictment as a co-conspirator and defendant, who testified that on October 16, 1956, the day after the said witness was released on bail, after having been held on a complaint upon which the indictment herein was based stated that he had a conversation with the Petitioner herein, which conversation is set forth verbatim on pages 9, 10 of this petition. The Court of Appeals in its decision stated that this admission was corroborated by a statement of the co-defendant Russano to the witness Botto, naming the Petitioner as his, Russano's source of supply. In this opinion, however, the United States Court of Appeals lost sight of the fact that it was permitting the witness Botto to corroborate one portion of his testimony (the testimony concerning Galgano's quasi admission) by another part of the same witness' own testimony (the other portion of Botto's testimony concerning a statement by the co-conspirator Russano that the Petitioner supplied Russano with narcotics). In short, according to the reasoning of the Court of Appeals, Botto was permitted to raise his testimony by its own boot straps to satisfy the requirement of corroboration required by the rules of evidence (See *U. S.* v. *Di Orio*, 150 F. 2d 938; Cert. denied 66 S. Ct. 175, 326 U. S. 771, 90 L. Ed. 465; *Anderson* v. *U. S.*, 124 F. 2d 58).

Concerning Government's Exhibit 33 in evidence, which were 10 empty Bankers Trust Company envelopes that were found in the home of the Petitioner at the time of his arrest, it is the Petitioner's position that these envelopes were inadmissible as having no bearing on the trial of the

issues and that their admission substantially prejudiced the trial of the Petitioner.

Earlier in the trial with regard to certain other defendants, Government's Exhibits 7 and 18 were admitted in evidence. These exhibits consisted of Bankers Trust Co. envelopes that were wrapped around glassine containers containing narcotics. It was the similarity in appearance of the aforementioned envelopes to the envelopes that were found in the Petitioner's home at the time of his arrest that is claimed to be a link in the chain of evidence tying the Petitioner to the conspiracy.

The statement of the United States Court of Appeals in its opinions that the envelopes were found on the Petitioner at the time of his arrest is factually incorrect as the evidence shows that the envelopes were found in the apartment of the Petitioner at the time of his arrest. Likewise it is undisputed that this apartment was the residence of the Petitioner, his wife and two children and that no narcotics, meeting place of conspirators or other criminal propensity was shown with regard to said apartment. In short by the admission of Exhibit 33 which exhibit had no logical relevance, the jury was confused and permitted to pyramid assumption upon assumption in order to connect the Petitioner with the crime charged, and likewise the Court of Appeals attempted to use this exhibit as independent evidence connecting the Petitioner with the crime so as to corroborate his purported admission.

It was conceded by the Trial Judge, the Hon. Edward Weinfeld, that if Exhibit 33 was inadmissible that the case against the Petitioner would have collapsed.

Sanders v. *U. S.*, 238 F. 2d 145, which case was used by the United States Court of Appeals in its opinion to justify the admissibility of Exhibit 33 is not in point as that case related to burglar's tools and equipment wherein the Court specifically stated as follows:

> "It is the generally accepted rule that in a case in which the defendant is charged with the offense of burglary, after proof of the burglary has been introduced the prosecution may show that the defendant had burglar tools or implements in his possession soon after the time of the commission of the offense and may introduce such tools or implements in evidence."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Exhibit A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 386—October Term, 1956.

(Argued June 7, 1957 Decided August 23, 1957.)

Docket No. 24570

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CARMINATI, WILLIAM MCKENNEY, JR., and MICHAEL GALGANO,

Appellants.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appellants appeal from judgments of guilty entered upon jury verdicts. Southern District of New York, Weinfeld, *J.* Affirmed.

PAUL W. WILLIAMS, U. S. Attorney, Southern District of New York (Jerome J. Londin, Robert Kirtland, Asst. U. S. Attorneys, of counsel), *for appellee.*

JACOB W. FRIEDMAN, New York City, *for appellants Carminati and McKenney.*

CURRAN, MAHONEY, COHN & STIM (Menahem Stim, Allen S. Stim, Otto F. Fusco, of counsel), New York City, *for appellant Galgano.*

Exhibit A—Opinion of the United States Court of Appeals

WATERMAN, *Circuit Judge*:

Appellants were convicted upon an indictment charging them with a conspiracy in violation of 18 U. S. C. §371 to receive, possess, and sell heroin in violation of the federal narcotics laws. 21 U. S. C. §§173, 174; 26 U. S. C. §§4701, 4703, 4704(a), 4724(c), 4771(a). Each appellant contends that the evidence as to him was insufficient to prove his participation in the conspiracy and each assigns as error certain rulings made by the trial court as to the admissibility of evidence. In addition to these contentions appellants Carminati and McKenney also contend the trial court erred in curtailing the cross-examination of two government witnesses, with respect to certain portions of the instructions to the jury, and in refusing the jury a full transcript of the stenographic minutes of the trial.

A conspiracy to violate the narcotics laws was conclusively proved. Ample evidence was introduced at the trial from which the jury could find the existence of a conspiracy at the center of which were Ralph and Salvatore Russano,[1] who were shown to be middlemen in a system of narcotics distribution involving more than 20 persons. In May 1955 Ralph Russano and one Michael Botto[2] (named in the indictment as a codefendant and co-conspirator with the Russanos, the appellants, and a number of others) began

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[1] The Russanos were both named as co-conspirators and co-defendants in the indictment, which charged them with substantive offenses as well. To each of these charges they pleaded guilty and on February 5, 1957 both were sentenced by the trial court.

[2] Botto pleaded guilty to the conspiracy charged placed against him, but the record does not disclose whether he has been sentenced.

dealing in heroin together. Shortly thereafter, the appellant McKenney, a cousin of Russano, joined their operation and the profits of the enterprise were then divided among the three of them. Botto later left this partnership and went into business for himself, although he continued to obtain his supply of heroin from Russano. In September or October of 1955, during the course of a discussion in which Botto complained to Russano of the quality of the heroin with which the latter had been supplying him, Russano said that he had a supplier from whom a better quality of heroin might be obtained. In response to an inquiry from Botto, Russano stated that Galgano was the supplier to whom he had referred. Subsequently, in October of 1956, Botto had a discussion with Galgano, whom he had testified to having met twice previously. During the course of this discussion, Galgano admitted supplying Russano with substantial amounts of heroin.[3] A month later Galgano was arrested in his home where the arresting officers discovered twelve Bankers Trust Company envelopes of the same type that had elsewhere been taken by government agents from the possession of other members of the conspiracy and that had been shown to have been used by these persons to deliver heroin.

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[3] Galgano, when arrested, denied that he knew Botto. He recalled, however, that on the date the above discussion allegedly occurred, a man known to him as "Blackie" was forcibly ejected by him from the bar where Botto testified that the conversation had taken place. A witness corroborated this version of the incident.

The trial judge charged the jury that Galgano could be convicted only if they believed Botto's testimony. Hence they must have accepted Botto's version of the events of that day and have believed that the conversation took place then and there as Botto detailed it.

David Oglesby, named in the indictment as a co-conspirator, implicated McKenney. He testified that in August of 1956 he called Ralph Russano to make arrangements for a purchase of heroin on behalf of a government agent. Russano said that he was unable to make the delivery but would send McKenney. Later that day McKenney kept the appointment with Oglesby which had been arranged by Russano.

Botto also implicated McKenney. In addition to his testimony concerning the partnership between Russano, McKenney, and himself during the summer of 1955, Botto testified that on October 18, 1956, McKenney participated in a discussion, which took place in a federal building, in which arrangements were made for the sale of heroin. Later that day Botto and a government agent met McKenney and several others, at which time McKenney told them that he had just refused to make a sale because the purchaser did not have enough money.[4] This testimony was confirmed by the government agent who was with Botto.

Oglesby was also the government's chief witness against the appellant Carminati. He testified to numerous transactions in which Carminati participated, only several of which need to be related. In the middle of October 1955, at which time Oglesby had made a purchase from the Russanos, Ralph Russano identified Carminati as one of his suppliers. A month later, when Oglesby again con-

[4] The testimony of Botto is ambiguous with respect to whether McKenney was the seller or the purchaser in this transaction. The government agent, however, testified that McKenney was the seller and the trial court so indicated to the jury in its summation of the evidence. The appellants do not contest this interpretation of the evidence.

tacted Russano about making a purchase, he was told that he would have to wait a while. After a discussion with Carminati, Russano told Oglesby that he was unable to obtain heroin for him at that time. In December of 1955, Russano informed Oglesby that if he wanted heroin he would have to take it "cut." When Oglesby objected, Russano made a telephone call and shortly thereafter Carminati came in. After a short discussion Carminati told Oglesby, "you will have to take seven ounces of cut stuff, which is the best we can do." Oglesby testified that he again had contact with Carminati in January of 1956 when he approached Russano about making a sale to him on consignment. Russano called Carminati, and after the latter advised him not to enter into the transaction, Russano told Oglesby, "I am sorry. Nothing can be done. I can't do anything." In addition, Oglesby testified to several other transactions in which Carminati was involved, and a government agent gave other evidence tending to prove Carminati's participation in the conspiracy.

This evidence adduced against each appellant, if competent as to him, was clearly sufficient to enable the jury to find that each of the appellants participated in the conspiracy charged by the Government in the indictment. Both Carminati and McKenney were shown to have participated actively in transactions between Russano and his customers. In addition, there was ample evidence from which the jury could believe that Carminati and Galgano each supplied heroin to the Russanos on more than one occasion. The circumstances, therefore, are unlike those in *United States* v. *Reina et al.*, 242 F. 2d 302 (2 Cir. 1957),

where evidence of a single sale by one Valachi was held insufficient to justify an inference that Valachi knew the sale was in execution of the larger venture which made up the conspiracy. Cf. *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (2 Cir. 1957). In the present case, the evidence established that Carminati knew the Russanos intended to resell the heroin. There was other evidence, consisting of Galgano's admission to Botto that he supplied substantial quantities of heroin to Russano, which justified an inference that Galgano also knew that Russano intended to resell the heroin which he obtained from Galgano.[5]

In *United States* v. *Tramaglino*, 197 F. 2d 928 (2 Cir. 1952), a similar case, we stated:

> Here then we have evidence of several sales, at different periods, by Rosario and Tramaglino, of marihuana to the same group of buyers with knowledge on the part of the two suppliers that several conspirators were involved in the purchases and

[5] Botto's testimony concerning this admission was as follows:

Q. And did you discuss narcotics with Galgano? A. I did.

Q. What did you say to Galgano and what did he say to you about narcotics? A. I told him that I was paying $400 an ounce for the stuff that he was giving to Ralph.

Mr. Fusco: That is objected to.

Q. Exactly what did you say to him, sticking as carefully as you can to the language of the conversation. A. I told him I was buying narcotics from Ralph and paying $400 an ounce, and that Ralph had told me "He was getting it from you."

He told me that when he gave the stuff to Ralph the stuff was all right.

Galgano's reply to Botto's statement that Galgano was the source of the heroin which Russano sold to Botto constitutes an admission by Galgano that he did, in fact, supply heroin to Russano. 4 Wigmore on Evidence, §1071 (3d Ed. 1940).

> that the purchases were for resale. This was enough, we think, to show that each appellant, as supplier, participated in, and acted to further the ends of, the conspiracy. It did not matter that neither had dealings with one another; each performed the same role at successive stages for the same ends. The overall conspiracy was the plan conceived by the intermediary group * * * to buy and resell marihuana at a profit. Both Rosario and Tramaglino knew and participated in this plan by furnishing the essential ingredient—the marihuana. In United States v. Bruno, 2 Cir., 105 F. 2d 921, 922, a case quite similar to this one, we said, in confirming a conviction of smugglers, middlemen, and retailers, for a single conspiracy to import and distribute narcotics illegally: "* * * the smugglers knew that the middlemen must sell to the retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators, at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of the part with which he was immediately concerned, was dependent upon the success of the whole."

Since the evidence we have reviewed is sufficient to sustain the jury's verdict, we turn to the several contentions of the appellants that portions of that evidence were improperly admitted and that other errors occurred during the course of the trial.

The statement made by Galgano to Botto in October 1956, that he had supplied Ralph Russano with heroin, was admitted only against Galgano; and was properly so received as an admission by Galgano of his role in the conspiracy. 4 Wigmore on Evidence §1048 (3d Ed. 1940). Galgano, however, contends that the admission was not corroborated as required by *Opper* v. *United States*, 348 U. S. 84 (1954). We think that, with respect to Galgano, Russano's disclosure to Botto that Galgano was his supplier (provided this conversation is admissible), together with the Bankers Trust Company envelopes found in Galgano's possession, constitute sufficient independent evidence of participation in the conspiracy to corroborate Galgano's admission and thus to satisfy the requirements of the *Opper* case. Galgano further contends, however, that Russano's statement to Botto implicating Galgano was hearsay and was not admissible against him. We disagree with Galgano.

The declaration of a conspirator is admissible against a co-conspirator if there is independent evidence of the existence of the conspiracy, *Glasser* v. *United States*, 315 U. S. 60 (1942), and if the declaration is in furtherance of the conspiracy, *Krulewitch* v. *United States*, 336 U. S. 440 (1949). Galgano's admission, properly admitted whether or not it was corroborated, provided sufficient independent evidence of the existence of the conspiracy to satisfy the first requirement. We believe that Russano's statement to Botto naming Galgano as a source of supply from whom a better quality of heroin might be obtained, must be considered as in furtherance of the conspiracy. Botto was a regular customer of Russano. He complained to Russano

of the quality of the heroin which he was obtaining from the latter. Russano indicated that he could obtain pure heroin, and in response to Botto's question, stated that Galgano was the source of supply. We understand this statement to be further assurance that a better quality heroin was available and therefore in furtherance of the conspiracy to distribute narcotics.

Galgano's contention that the Bankers Trust Company envelopes were inadmissible at the trial is also without merit. Similar envelopes, shown to be connected with the conspiracy, had already been introduced into evidence. While Galgano had the right, which he exercised, of offering other explanations for his possession of the envelopes, the fact that this evidence, standing alone, might not have been sufficient to sustain a conviction did not affect its admissibility. It was relevant as bearing upon his connection with the conspiracy. Cf. *Sanders* v. *United States*, 238 F. 2d 145 (10 Cir. 1956).

The appellants Carminati and McKenney, relying on *Alford* v. *United States*, 282 U. S. 687 (1931), urge as ground for reversal that two witnesses for the Government, Oglesby and Schwartz, were excused from giving their addresses on cross-examination. In *Alford* the Supreme Court held that a witness may be cross-examined as to his residence because this information would enable the jury to identify the witness in his environment, might, under some circumstances, provide new avenues of exploration for defense counsel. With these factors in mind, we turn to the facts of the present case. With respect to Oglesby, the claim is frivolous. Appellants

obtained all the information about his residence that they asked of him. Nor is there any merit in their contention that they were erroneously denied knowledge of the residence of Schwartz. Schwartz was a witness for the Government and during his cross-examination counsel for one of the defendants questioned Schwartz about certain transactions occurring during June 1956. His question as to the address of the witness at that time was met by an objection from the Government which was sustained by the court. The only information which was elicited was that Schwartz resided in the Bronx. During the testimony of the very next witness, however, Schwartz's address was revealed. Under the circumstances of this case, we cannot find that the appellants were injured by the ruling curtailing Schwartz's cross-examination or that the ruling was reversible error. Schwartz had undergone thorough cross-examination. He had testified that he lived with his parents in the Bronx and he gave full details of past and present employment. His testimony further revealed that he had pleaded guilty and was awaiting sentence in the present case, that he had never before been an informer or witness for any prosecutor in a criminal case, that he had no previous criminal record, and that he did not use narcotics. This testimony gave the jury ample information with which to determine the credibility of the witness. Furthermore, although the next witness revealed Schwartz's address, defense counsel did not attempt to recall him or in any way seek to make use of this information.

Carminati seeks a reversal of his conviction because of an incident which occurred during the testimony of Botto.

Botto testified that he was arrested on the conspiracy charge and taken to the West Street jail. He related a conversation he had while there with Rich, a codefendant, in which Rich stated that Carminati was Ralph Russano's connection. Counsel objected to the testimony. The court ordered it stricken and instructed the jury to disregard it. If the testimony had remained in evidence, Rich's participation in the conspiracy having ended with his arrest, *Graham* v. *United States*, 15 F. 2d 741 (8 Cir. 1926), reversal would be required. *Krulewitch* v. *United States*, *supra*. But counsel for Carminati did not object to the question put to Botto, and, consequently, the answer was received before objection was made. The testimony was stricken as soon as counsel made known his objection, the trial court then proceeding at once to protect the defendant's rights. No error was committed.

Other issues raised by Carminati and McKenney deserve only brief mention. Both object to the charge of the trial court that "constructive possession" of a narcotic drug is sufficient to raise the presumption created by 21 U. S. C. §174. However, the charge was contained in that portion of the instructions which dealt with the substantive counts against another defendant not involved on this appeal and did not deal with the conspiracy. Under these circumstances, even if the charge was erroneous, as to which we express no opinion, the appellants would have no ground for complaint.

Carminati assigns as error that portion of the trial court's summation of the evidence dealing with Oglesby's testimony. The trial court, in an unqualified statement, re-

ferred to Carminati as the man whom Oglesby had identified as being involved in a certain transaction. Carminati contends that Oglesby had testified only that Carminati resembled the man whom he had seen, but on the whole record it is clear that the trial court was correct in its summation.

Nor was there error in the refusal of the trial court to provide the jury with a full set of the minutes. We have previously recognized that this is a matter within the discretion of the trial court, *U. S.* v. *Rosenberg*, 195 F. 2d 583 (2 Cir. 1952). Moreover, it is evident from the record that in the present case the jury obtained all of the information which it had requested.

Other errors alleged by the appellants to have been committed during the course of the trial have been considered by us, but they are without merit and do not warrant discussion.

Judgments affirmed.

Exhibit B

Count 14 of the Indictment

FOURTEENTH COUNT

1. Commencing on or about the 1st day of January, 1951 and continuously thereafter up to and including the day of the filing of this indictment, in the Southern District of New York, SALVATORE RUSSANO, RALPH RUSSANO, ANTHONY CARMINATI, WILLIAM MCKENNEY, JR., FRANK RICH, ROBERT GUIPPONE, JOSEPH AMBROSINI, CARLOS RUIZ, MARY LOU BROLET RUSSANO, SEBASTIAN DELLA UNIVERSITA, MICHAEL BOTTO, MICHAEL GALGANO, DAVID SHACKELFORD, DONALD BAUER and ADA VOLKELL, the defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with John Sciarra, David Oglesby, Irwin Greenspun, Vicki Cratty, Freddie Cratty, Abraham Schwartz, Carrenza M. Howard, Daniel Murphy and "John Doe" also known as Wilson, white male, blonde hair, 30-35 years of age, approximately 5'11" tall and 180 pounds weight, named herein as co-conspirators, but not defendants, and with others to the grand jury unknown to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the grand jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to

the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as aforesaid any United States Internal Revenue Stamps as required by Section 4703, of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a) and 4771(a) of Title 26, United States Code.

3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACT

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 1st day of April, 1955, in the Southern District of New York, in the Cafe Expresso, 180th Street and Arthur Avenue, Bronx, New York, ROBERT

Exhibit B—Count 14 of the Indictment

GUIPPONE, RALPH RUSSANO, SALVATORE RUSSANO, and MICHAEL BOTTO met.

2. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of May, 1955, in the Southern District of New York, in the Cafe Expresso, 180th Street and Arthur Avenue, Bronx, New York, JOSEPH AMBROSINI, RALPH RUSSANO, SALVATORE RUSSANO, MICHAEL BOTTO and FRANK RICH had a conversation.

3. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of September, 1955, in the Southern District of New York, SALVATORE RUSSANO and RALPH RUSSANO, sold approximately 2 ounces of heroin to CARLOS RUIZ in John's Bar, 180th Street and Third Avenue, Bronx, N. Y.

4. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of September, 1955, in the Southern District of New York, in the Delmont Bar, 624 East 180th Street, Bronx, New York, MICHAEL GALGANO and MICHAEL BOTTO had a conversation.

5. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 10th day of October, 1955, in the Southern District of New York, SALVATORE RUSSANO, RALPH RUSSANO and ANTHONY CARMINATI met David Ogelsby and two unknown men in John's Bar on 180th Street and Third Avenue, Bronx, N. Y.

6. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of February, 1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y.,

Exhibit B—Count 14 of the Indictment

SEBASTIAN DELLA UNIVERSITA and MICHAEL BOTTO had a conversation.

7. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 15th day of February, 1956, in the Southern District of New York, SALVATORE RUSSANO, RALPH RUSSANO and ANTHONY CARMINATI, had a conversation with David Ogelsby on the corner of Clinton and East Tremont Avenues, Bronx, New York.

8. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 1st day of March, 1956, in the Southern District of New York, SALVATORE RUSSANO, RALPH RUSSANO, ANTHONY CARMINATI, David Oglesby and John Doe, a/k/a Angelo had a conversation in a luncheonette at the corner of East Tremont and Park Avenues, Bronx, New York.

9. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 20th day of June, 1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y., MICHAEL BOTTO had a conversation with Abraham Schwartz and John Sciarra.

10. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 23rd day of June, 1956, in the Southern District of New York, in the vicinity of 77th Street and Central Park West, FRANK RICH sold approximately ½ ounce of heroin to Abraham Schwartz and John Sciarra.

11. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 26th day of June,

1956, in the Southern District of New York, in the vicinity of 51st Street and 8th Avenue, New York, N. Y., DAVID SCHACKELFORD received one hundred dollars ($100.00) from John Sciarra.

12. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 28th day of June, 1956, in the Southern District of New York, in the vicinity of 180th Street and Broadway, New York, N. Y. FRANK RICH sold approximately 1 ounce of heroin to Abraham Schwartz and John Sciarra.

13. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 20th day of August, 1956, in the Southern District of New York, SALVATORE RUSSANO and RALPH RUSSANO sold 352 grains of heroin to an agent of the Federal Bureau of Narcotics in a luncheonette at the corner of East Tremont and Clinton Avenues, Bronx, N. Y.

14. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the Southern District of New York, DONALD BAUER and FRANK RICH met in the vicinity of 51st Street and 8th Avenue, New York, N. Y.

15. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of August, 1956, in the vicinity of the Delmont Bar 624 East 180th Street, Bronx, N. Y., ANTHONY CARMINATI and RALPH RUSSANO had a conversation.

16. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 22nd day of Au-

gust, 1956, in the Southern District of New York, SALVATORE RUSSANO and RALPH RUSSANO sold approximately 1 ounce of heroin to FRANK RICH in the vicinity of LaFontaine Avenue between 179th Street and 180th Streets, Bronx, N. Y.

17. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 7th day of September, 1956, in the Southern District of New York, WILLIAM MCKENNEY, JR. had a telephone conversation with David Oglesby.

18. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 25th day of September, 1956, in the Southern District of New York, JOSEPH AMBROSINI while driving a 1956 Oldsmobile between the vicinity of 696 East Fordham Road, Bronx, N. Y. and the vicinity of Fordham Road and the Grand Concourse, sold approximately 2 ounces of heroin to Carrenza M. Howard.

19. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 18th day of October, 1956, in the vicinity of the U. S. Courthouse, Foley Square, New York, N. Y., WILLIAM MCKENNEY, JR. and MARY LOU BROLET RUSSANO had a conversation with MICHAEL BOTTO.

20. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 18th day of October, 1956, in the Southern District of New York, in Silverio's Restaurant, 542 East 180th Street, Bronx, N. Y., MARY LOU BROLET RUSSANO and SEBASTIAN DELLA UNIVERSITA had a conversation.

Exhibit B—Count 14 of the Indictment

21. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 16th day of November, 1956, in the Southern District of New York, JOSEPH AMBROSINI while driving a 1956 Oldsmobile between the vicinity of Fordham Road and 189th Street, Bronx, N. Y. and the vicinity of Tremont and Crotona Avenues, Bronx, N. Y. sold approximately 2 ounces of heroin to Carrenza M Howard.

22. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 16th day of November, 1956, in the Southern District of New York, ADA VOLKELL placed 2 ounces of heroin in a stairwell window ledge located in 496 East 189th Street, Bronx, N. Y.

23. In further pursuance of the said conspiracy and to effect the objects thereof, on or about the 16th day of November, 1956, in the Southern District of New York, ADA VOLKELL and JOSEPH AMBROSINI had in their possession in apartment E-25 496 East 189th Street, Bronx, New York approximately 8½ ounces of heroin, glassine bags, quinine, sugar, scales, and other miscellaneous equipment commonly employed in diluting heroin.

(Title 18, United States Code, Section 371).

PAUL W. WILLIAMS
United States Attorney

.....
Foreman

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IN THE

Supreme Court of the United States

October Term, 1957

No. 497

ANTHONY CARMINATI and WILLIAM McKENNEY, JR.,
Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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170 Broadway
New York 38, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

ANTHONY CARMINATI and WILLIAM MCKENNEY, JR.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now come Anthony Carminati and William McKenney, Jr., by their attorney, Jacob W. Friedman, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which Court imposed a prison sentence on each of the petitioners.

Opinions Below

The opinion of the Court of Appeals is set forth in the Appendix, *infra*. There was no opinion by the District Judge.

Jurisdiction

The judgment of the Court of Appeals was entered on August 23, 1957. No application was made to that Court for rehearing. The jurisdiction of this Court is invoked under: 18 U. S. C. 2(a); 18 U. S. C. 371; 21 U. S. C. 173; 21 U. S. C. 174; 26 U. S. C. 2553(a); 26 U. S. C. 2554(a); Federal Rules of Criminal Procedure, Rule 17c.

Questions Presented

(1) Whether the Government proved the conspiracy charged in the indictment, and whether the alleged participation of these petitioners in a separable transaction or transactions suffices to sustain the conviction.

(2) Whether the action of the District Court in excusing two key witnesses for the Government from giving their addresses and in curtailing cross-examination in that connection did not constitute reversible error.

(3) Whether the improper reception of alleged declarations of a coconspirator made after the termination of the alleged conspiracy did not constitute a grave violation of these petitioners' rights.

(4) Whether the reception in evidence of an alleged conversation between Ralph Russano and three unidentified persons was prejudicial and reversible error.

(5) Whether the District Court erred in charging that constructive possession created a presumption of guilt.

(6) Whether the District Court's unqualified description of the identification of petitioner Carminati was error.

(7) Whether the District Court erred in twice refusing the request of the jury during its deliberations that the minutes be read to it.

Statutes Involved

Apart from those provisions of the law relating to the payment of taxes and the attaching of stamps, which are not pertinent herein, the statutes involved are as follows:

Title 18 United States Code.

> "Sec. 371. Conspiracy to commit offense or to defraud United States.
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Title 21, United States Code.

> "Sec. 173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeiture.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported

and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes (Feb. 9, 1909, c. 100, Sec. 2,. 35, Stat. 614; Jan. 17, 1914, c. 9, 38, Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.)"

"Sec. 174. Same; Penalty; evidence.

"Whoever, fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, conceal-

ment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned, not less than five years or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Statement

The petitioners herein appealed in the first instance from a judgment of the United States District Court for the Southern District of New York, convicting them of the crime of conspiracy (18 U. S. C. Sec. 371) to violate certain statutes of the United States dealing with narcotic drugs, namely, 26 U. S. C. Secs. 4704(a), 4701, 4703, 4724(c), 4771(a) and 21 U. S. C. Secs. 173 and 174. Trial was had between January 7, 1957, and January 14, 1957, before Weinfeld, *D. J.*, and a jury, and the two present petitioners were convicted only on the conspiracy count, which was the 14th count of the indictment. Petitioner Carminati was sentenced to 10 years and petitioner McKenney to 5 years.

With the exception of the overt acts, that count of the indictment charging conspiracy reads as follows:

"FOURTEENTH COUNT

"1. Commencing on or about the 1st day of January, 1951 and continuously thereafter up to and including the day of the filing of this indictment, in the Southern District of New York Salvatore Russano, Ralph Russano, Anthony Carminati, William McKenney, Jr., Frank Rich, Robert Guippone, Joseph Ambrosini, Carlos Ruiz, Mary Lou Brolet Russano, Sebastian Della Universita, Michael Botto, Michael Galgano, David Schackelford, Donald Bauer and Ada Volkell, the defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with John Sciarra, David Oglesby, Irwin Greenspun, Vicki Cratty, Freddie Cratty, Abraham Schwartz, Carrenza M. Howard, Daniel Murphy and 'John Doe' also known as Wilson, white male, blonde hair, 30-35 years of age, approximately 5' 11" tall and 180 pounds weight, named herein as co-conspirators, but not defendants, and with others to the grand jury unknown to violate the United States Code, Title 26, Sections 4704(a), 4701, 4703, 4724(c) and 4771(a), and Title 21, Sections 173 and 174.

"2. It was part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly would sell, dispense and distribute a quantity of narcotic drugs, the exact amount and nature thereof being to the grand jury unknown, in that the said narcotic drugs would not be in the original stamped package or from the original stamped package, that is to say, that there would not be affixed to the container in and from which the said defendants would sell, dispense and distribute the narcotic drugs as

aforesaid any United States Internal Revenue Stamps as required by Section 4703, of Title 26, United States Code in violation of Sections 4701, 4703, 4704(a) of Title 26, United States Code.

"3. It was further a part of said conspiracy that the said defendants, being persons who had not registered and who had not paid the special tax provided for by Sections 4702(a), 4721 and 4722 of Title 26, United States Code, unlawfully, wilfully, and knowingly would have in their possession and under their control a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, in violation of Section 4724(c) of Title 26, United States Code.

"4. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, sell and facilitate the transportation, concealment and sale of the aforesaid narcotic drugs, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code."

An inspection of the foregoing count discloses that the indictment named some 24 conspirators, including the two petitioners herein.

We observe at the outset that the identification of petitioner Carminati was of extremely imperfect character. When the Government's chief witness, David Oglesby, a narcotics addict with a long criminal record (R. 3), was asked whether he saw in the courtroom the individual who had made certain equivocal remarks, he said (R. 44), "I see a man resembling him." This was the basis of the

identification, and on cross-examination with regard to Carminati (R. 82-83), he said, "Well, according to my memory it is the best I can say was that he looks like him, looks exactly like him." At several points the trial Court assisted the witness in the attempted identification of Carminati (R. 56-57, 83).

It must also be remembered that without the testimony of Oglesby it would have been impossible to procure a conviction of Carminati. This was conceded by the Government and the jury was charged accordingly. The other testimony with respect to Carminati (or the person who Oglesby said resembled Carminiati) was of a vague and uncertain character consisting of several unintelligible remarks and the conversation regarding the quality of some merchandise entirely susceptible of an innocent construction (R. 741-750).

With regard to appellant McKenney, the testimony consisted mainly of alleged conversations in his presence (R. 755-765), without proof that he participated in any conspiracy or did anything in furtherance thereof. The trial Court also assisted in his implication (R. 79).

The best that can be said for the Government's position is that the proof against these petitioners was certainly not of a clear or conclusive character. The least weight that is ascribable to this aspect of the case is that it entitled them to a trial free from error, so that incorrect rulings which otherwise might be disregarded must be given greater force in their possible bearing upon the outcome.

The cumulative effect of as few as two errors may necessitate the reversal of a conviction. See *Gordon* v. *United*

States, 344 U. S. 414, 97 L. Ed. 447. Especially where the case is "a close one" and not "open and shut," an error otherwise harmless will be deemed prejudicial. *Bihn* v. *United States,* 328 U. S. 633, 90 L. Ed. 1485.

While petitioners appreciate that this is not the forum in which to press questions of fact, it is urged on their behalf that they have consistently maintained their complete innocence, a circumstance which certainly should not detract from the validity of their arguments in any appellate tribunal.

Lest there be any question as to the availability of objections, we desire to point out that counsel for one of the defendants inquired at the beginning of the trial whether all of them might have objections noted when any other presented one, whereupon the Court ruled (R. 13):

> "Yes, the objection of one counsel and the ruling will inure to the benefit of all unless otherwise so stated at the time."

Reasons for Granting Writ

The opinion of the Court of Appeals presents several questions of law, and it is at least arguable whether the determination does not conflict with opinions of the Supreme Court of the United States on like questions. It is also believed that the view taken by the Court of Appeals is contrary to the proceedings disclosed by the record. A number of the rulings involved constitute prejudicial error. Undersigned counsel is aware of the requirements of this Court's rules that the questions presented for review be expressed without unnecessary detail, and an attempt will be made to present these matters as concisely as is consistent with the necessities of the case.

ARGUMENT

QUESTION NO. 1

Whether the Government proved the conspiracy charged in the indictment, and whether the alleged participation of these petitioners in a separable transaction or transactions suffices to sustain the conviction.

The theory of prosecution herein was a conspiracy involving 24 named individuals. The metaphor employed by the Government was that of a wheel in which the two Russanos were at the center and the other individuals the spokes. The proof, however, fell far short of showing any single scheme involving all or a great number of the persons named. This constituted a fatal variance between the evidence and the indictment under which petitioners were convicted. No fair construction of the proof can assimilate the separable and unrelated transactions to a single conspiracy. The point was duly raised and preserved by the several motions of petitioners for a dismissal of the indictment. Petitioner Carminati urged specifically that there was no evidence with respect to his conduct "which would place him in the conspiracy, which is, of course, the only count he is charged with in this indictment" (R. 740-741). Counsel for McKenney likewise moved for a judgment of acquittal at the close of the Government's case "on the ground that the Government has failed to show that McKenney participated in this conspiracy or that he had any knowledge that the conspiracy existed" (R. 765).

The holding of the United States Court of Appeals herein seems to be an instance of an unauthorized deviation from

the decision in *Kotteakos* v. *United States*, 328 U. S. 750, 90 L. Ed. 1557. While petitioners relied on it below, it was not even mentioned in the opinion. This Court will recall that there a number of defendants were indicted for a single conspiracy to obtain loans upon fraudulent applications. The evidence showed that the applications were separately made and that their only connection with each other was that they were negotiated by the same person who, acting as broker, was the central figure in the conspiracy. The Court held that even though the result would probably have been the same in separate trials, the defendants obviously being guilty of making the fraudulent applications, the error of combining the charges in one indictment could not be viewed as harmless and the conviction had to be reversed. It is submitted that the authority of this decision vitiates the conviction herein. Moreover, the holding below appears to run contrary to the decision of the same Court of Appeals in *United States* v. *Koch*, 113 F. 2d 982, where a defendant purchasing a large quantity of cocaine from a third person was prosecuted for conspiring to import and dispose of narcotics. The Court held that the Government was required to show that the defendant in some way knowing associated in the unlawful common enterprise to import drugs and dispose of them unlawfully, and that a mere showing of his having purchased a large quantity was insufficient.

QUESTION NO. 2

Whether the action of the District Court in excusing two key witnesses for the Government from giving their addresses and in curtailing cross-examination in that connection did not constitute reversible error.

One of the Government's most important witnesses was one Abraham Schwartz. His testimony fills about 80 pages of the record (R. 477-558). He made some six or seven sales (R. 547-548). Nevertheless, he was excused, on the Government's objection from giving his address (R. 531-532).

A like error occurred with regard to David Oglesby (R. 89-92), who may be considered the Government's chief witness. He was permitted merely to indicate the neighborhood where he lived.

It should hardly be necessary at this time to argue *de novo* that the environment of a witness is invariably a fundamental consideration in the approach to a thorough cross-examination. The barring of this avenue effectively keeps from the jury a mass of information which necessarily bears on the credibility of the witness. It also forecloses further investigation by the defense. The question was the subject of a comprehensive discussion by the late Mr. Chief Justice Stone in *Alford* v. *United States*, 282 U. S. 687, 75 L. Ed. 624, writing for the unanimous Court. Without quoting from the illuminating rationale of the holding, we simply mention that the trial Court was there viewed as having cut off at the outset all inquiry on a subject to which the defense was entitled to great latitude of cross-examination. It was said that "this was an abuse

of discretion and prejudicial error." Nor was it deemed necessary to pass on any other point presented, the judgment of conviction being reversed for that error alone.

The Court below, following the Government's argument, held that the error with respect to Schwartz was cured by the testimony of a subsequent witness, one Doyle (R. 564). The attempted curing of the error is untenable. To begin with, Doyle merely stated that Schwartz gave a certain address at the time of arrest—clearly hearsay. Secondly, the arrest took place on June 29th, 1956, whereas the date of the testimony was Janaury 10th, 1957; the inquiry of counsel was not directed to the former address of the witness. Thirdly, it was recently held in *United States* v. *Fontana,* 231 F. 2d 807, by the Third Circuit, that where the trial Court improperly curtails cross-examination, the error is not cured by subsequent evidence bearing upon the same subject-matter, nor does this constitute an adequate substitute for the right to cross-examine. The cross-examination is a matter of right which must be exercised and afforded in its proper context. That Court relied principally on *Alford* v. *United States,* 282 U. S. 687, 75 L. Ed. 624, whose authority has not been restricted or impaired—despite the Government's suggestion to the contrary, the United States Attorney arguing that that case "must not be extended beyond its obvious limits." Finally, the action of a trial judge in excusing a witness from giving his address inevitably creates in the minds of the jury the apprehension that the defendants on trial are of a character to inflict some grievous harm upon the witness, all to defendants' manifest prejudice. When a controlling holding of this Court is misapplied or its applicability is clouded with doubt, a classic case is presented for the granting of certiorari.

QUESTION NO. 3

Whether the improper reception of alleged declarations of a coconspirator made after the termination of the alleged conspiracy did not constitute a grave violation of these petitioners' rights.

During the direct examination by the Government of the important witness Michael Botto (p. 51) the following occurred:

> "Q. You testified that you were arrested shortly thereafter? A. Yes.
>
> "Q. About when was this? A. Columbus Day, 1956.
>
> "Q. Were you taken to West Street? A. Yes, sir.
>
> "Q. Meet anyone there? A. Yes, I met Ralph Russano, Salvatore Russano, Frank Rich, Dave Shackelford, and this fellow Joe.
>
> "Q. Did you talk to Rich? A. Yes, I talked to Rich about the case. And he had told me there are a lot of names mentioned in this case that he never heard of. Then after he told me some of the names, I said, 'There are some of the names I never heard of.' And he had told me that this Tony Carminati was Ralph Russano's connection."

At this juncture counsel for three defendants jumped to their feet and objected to the conversation. The Court struck it out, observing that counsel had allowed the answer to go in. This was not so. The witness was merely asked whether he had spoken to Frank Rich. He was not asked for the conversation. Where, then, was the opportunity to object? The highly damaging nature of the testimony is self-evident. The reception in evidence of an alleged declaration of a coconspirator after the conceded termination

of the conspiracy is clear and reversible error. *Krulewitch* v. *United States*, 336 U. S. 440, 93 L. Ed. 790, where Mr. Justice Jackson vividly expounded the utter ineffectiveness of an instruction to a jury to disregard prejudicial evidence. See also *Lutwak* v. *United States*, 344 U. S. 604, 97 L. Ed. 593.

The learned Court of Appeals below recognized the seriousness of receiving such evidence, saying:

> "If the testimony had remained in evidence, Rich's participation in the conspiracy having ended with his arrest, . . . reversal would be required. *Krulewitch* v. *United States, supra.* But counsel for Carminati did not object to the question put to Botto, and, consequently, the answer was received before objection was made."

It would appear that the onus of objecting to an innocent question on the assumption that the witness is about to give an unresponsive answer, creates an intolerable burden upon counsel. Under the circumstances disclosed, it is submitted that the error was ineradicable.

QUESTION NO. 4

Whether the reception in evidence of an alleged conversation between Ralph Russano and three unidentified persons was prejudicial and reversible error.

The chief witness for the Government, Oglesby, testified that he overheard a conversation between Ralph Russano, one of the conspirators named in the indictment, and three unknown men concerning "three pieces"—meaning three ounces of narcotics (R. 36-38). This testimony was received over objection and upon the assertion of the Govern-

ment in the presence of the jury that these unidentified men were coconspirators (R. 36-37). The meeting was not brought home to or connected with petitioners, and the evidence was highly prejudicial. It certainly had no logical connection with any activity of a defendant and was remote from the issues of the trial.

The law relating to the trial of conspiracy indictments does not sanction the introduction of such proof, even though the prosecution be for that "elastic, sprawling and pervasive offense," wherein "loose practice" has been denounced as "a serious threat to fairness in our administration of justice." *Krulewitch* v. *United States*, 336 U. S. 440, 445, 93 L. Ed. 790. It must be noted that this testimony was received prior to any mention of these petitioners in the case. It is still the rule that "a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime." *Terry* v. *United States*, 7 F. 2d 28, 30. The acts of an alleged coconspirator are admissible only after defendant on trial has become associated therewith. See 3 Underhill on Criminal Evidence, 1957 Ed., Sec. 863.

QUESTION NO. 5

Whether the District Court erred in charging that constructive possession created a presumption of guilt.

21 U. S. Code Sec. 174, to the extent at present pertinent, provides:

> "Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed evidence to authorize conviction

> unless the defendant explains the possession to the satisfaction of the jury."

After charging the foregoing, the District Judge went a step beyond the statute and instructed (see Galgano app., 79a):

> "Again, you understand it is not necessary to show actual physical or direct possession by any defendant. Possession of any sort—either actual or constructive—is sufficient to raise the presumption under the statute which I have just read to you and to place upon the accused the burden of explaining the possession to the jury."

It is true that no exception was taken to the qualification, but it would appear to be a plain error affecting petitioners' rights. Although the statutory presumption arising from proof of possession has been held constitutional (see *Yee Hem* v. *United States*, 268 U. S. 178, 69 L. Ed. 904), we feel that the extension of the provision to embrace a constructive possession is not a correct or valid interpretation of the law. Nor does any holding of this Court compel such construction. Any statute making possession presumptive evidence of guilt, being in derogation of the common law and of the presumption of innocence, is required to be given a strict construction. See *United States* v. *One Studebaker Roadster*, 40 F. 2d 557.

QUESTION NO. 6

Whether the District Court's unqualified description of the identification of petitioner Carminati was error.

In discussing Oglesby's testimony (Galgano app. 68a) as implicating petitioner Carminati, the District Judge stated in his instructions without the slightest qualification that this was the man "whom he identified in the courtroom as the defendant Anthony Carminati." To this portion of the charge due exception was taken (87a). We have already indicated how halting and uncertain the supposed identification was, so that the reference to the supposed identification as being categorical was unfair and tended to deprive petitioner Carminati of the benefit of an identification equivocal at best. "It is error for the court, when stating the evidence, to ignore material portions of it." Abbott's Crim. Trial Prac., 4th Ed., Sec. 670. A summary of the evidence is required to be fair, adequate and accurate. *Boatright* v. *United States*, 105 F. 2d 685; *Minner* v. *United States*, 57 F. 2d 506; *Davis* v. *United States*, 227 F. 2d 568.

QUESTION NO. 7

Whether the District Court erred in twice refusing the request of the jury during its deliberations that the minutes be read to it.

An unusual occurrence arose during the jury's deliberation on the case. On two separate occasions, at intervals of three hours, the jury requested that the minutes of the trial be read to it (Galgano app. 93a, 96a). Each time the Court refused, saying, "I am definitely opposed to giving them a full set of the minutes." We recognize that there

may be cases where refusal is discretionary (cf. *United States* v. *Rosenberg*, 195 F. 2d 583). But elsewhere it has been held error. See *People* v. *Henderson*, 4 Cal. 2d 188, 48 P. 2d 17; *Lett* v. *Commonwealth*, 284 Ky. 267, 144 S. W. 2d 505; *Jackson* v. *Commonwealth*, 60 Va. 656. The time necessitated for the reading has been held not to justify a refusal. *United States* v. *Campbell*, 138 F. Supp. 344. If the matter should be deemed discretionary, we submt that discretion was abused in a case turning upon doubtful identification and where petitioners' connection with the alleged conspiracy was remote.

CONCLUSION

For all of the foregoing reasons, this petition for certiorari should be granted.

JACOB W. FRIEDMAN,
Attorney for Petitioners.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 386—October Term, 1956.

(Argued June 7, 1957 Decided August 23, 1957.)

Docket No. 24570

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY CARMINATI, WILLIAM MCKENNEY, JR., and MICHAEL GALGANO,

Appellants.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Appellants appeal from judgments of guilty entered upon jury verdicts. Southern District of New York, Weinfeld, *J.* Affirmed.

PAUL W. WILLIAMS, U. S. Attorney, Southern District of New York (Jerome J. Londin, Robert Kirtland, Asst. U. S. Attorneys, of counsel), *for appellee.*

JACOB W. FRIEDMAN, New York City, *for appellants Carminati and McKenney.*

CURRAN, MAHONEY, COHN & STIM (Menahem Stim, Allen S. Stim, Otto F. Fusco, of counsel), New York City, *for appellant Galgano.*

WATERMAN, *Circuit Judge*:

Appellants were convicted upon an indictment charging them with a conspiracy in violation of 18 U. S. C. §371 to receive, possess, and sell heroin in violation of the federal narcotics laws. 21 U. S. C. §§173, 174; 26 U. S. C. §§4701, 4703, 4704(a), 4724(c), 4771(a). Each appellant contends that the evidence as to him was insufficient to prove his participation in the conspiracy and each assigns as error certain rulings made by the trial court as to the admissibility of evidence. In addition to these contentions appellants Carminati and McKenney also contend the trial court erred in curtailing the cross-examination of two government witnesses, with respect to certain portions of the instructions to the jury, and in refusing the jury a full transcript of the stenographic minutes of the trial.

A conspiracy to violate the narcotics laws was conclusively proved. Ample evidence was introduced at the trial from which the jury could find the existence of a conspiracy at the center of which were Ralph and Salvatore Russano,[1] who were shown to be middlemen in a system of narcotics distribution involving more than 20 persons. In May 1955 Ralph Russano and one Michael Botto[2] (named in the indictment as a codefendant and co-conspirator with the Russanos, the appellants, and a number of others) began

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[1] The Russanos were both named as co-conspirators and co-defendants in the indictment, which charged them with substantive offenses as well. To each of these charges they pleaded guilty and on February 5, 1957 both were sentenced by the trial court.

[2] Botto pleaded guilty to the conspiracy charged placed against him, but the record does not disclose whether he has been sentenced.

dealing in heroin together. Shortly thereafter, the appellant McKenney, a cousin of Russano, joined their operation and the profits of the enterprise were then divided among the three of them. Botto later left this partnership and went into business for himself, although he continued to obtain his supply of heroin from Russano. In September or October of 1955, during the course of a discussion in which Botto complained to Russano of the quality of the heroin with which the latter had been supplying him, Russano said that he had a supplier from whom a better quality of heroin might be obtained. In response to an inquiry from Botto, Russano stated that Galgano was the supplier to whom he had referred. Subsequently, in October of 1956, Botto had a discussion with Galgano, whom he had testified to having met twice previously. During the course of this discussion, Galgano admitted supplying Russano with substantial amounts of heroin.[3] A month later Galgano was arrested in his home where the arresting officers discovered twelve Bankers Trust Company envelopes of the same type that had elsewhere been taken by government agents from the possession of other members of the conspiracy and that had been shown to have been used by these persons to deliver heroin.

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[3] Galgano, when arrested, denied that he knew Botto. He recalled, however, that on the date the above discussion allegedly occurred, a man known to him as "Blackie" was forcibly ejected by him from the bar where Botto testified that the conversation had taken place. A witness corroborated this version of the incident.

The trial judge charged the jury that Galgano could be convicted only if they believed Botto's testimony. Hence they must have accepted Botto's version of the events of that day and have believed that the conversation took place then and there as Botto detailed it.

David Oglesby, named in the indictment as a co-conspirator, implicated McKenney. He testified that in August of 1956 he called Ralph Russano to make arrangements for a purchase of heroin on behalf of a government agent. Russano said that he was unable to make the delivery but would send McKenney. Later that day McKenney kept the appointment with Oglesby which had been arranged by Russano.

Botto also implicated McKenney. In addition to his testimony concerning the partnership between Russano, McKenney, and himself during the summer of 1955, Botto testified that on October 18, 1956, McKenney participated in a discussion, which took place in a federal building, in which arrangements were made for the sale of heroin. Later that day Botto and a government agent met McKenney and several others, at which time McKenney told them that he had just refused to make a sale because the purchaser did not have enough money.[4] This testimony was confirmed by the government agent who was with Botto.

Oglesby was also the government's chief witness against the appellant Carminati. He testified to numerous transactions in which Carminati participated, only several of which need to be related. In the middle of October 1955, at which time Oglesby had made a purchase from the Russanos, Ralph Russano identified Carminati as one of his suppliers. A month later, when Oglesby again con-

[4] The testimony of Botto is ambiguous with respect to whether McKenney was the seller or the purchaser in this transaction. The government agent, however, testified that McKenney was the seller and the trial court so indicated to the jury in its summation of the evidence. The appellants do not contest this interpretation of the evidence.

tacted Russano about making a purchase, he was told that he would have to wait a while. After a discussion with Carminati, Russano told Oglesby that he was unable to obtain heroin for him at that time. In December of 1955, Russano informed Oglesby that if he wanted heroin he would have to take it "cut." When Oglesby objected, Russano made a telephone call and shortly thereafter Carminati came in. After a short discussion Carminati told Oglesby, "you will have to take seven ounces of cut stuff, which is the best we can do." Oglesby testified that he again had contact with Carminati in January of 1956 when he approached Russano about making a sale to him on consignment. Russano called Carminati, and after the latter advised him not to enter into the transaction, Russano told Oglesby, "I am sorry. Nothing can be done. I can't do anything." In addition, Oglesby testified to several other transactions in which Carminati was involved, and a government agent gave other evidence tending to prove Carminati's participation in the conspiracy.

This evidence adduced against each appellant, if competent as to him, was clearly sufficient to enable the jury to find that each of the appellants participated in the conspiracy charged by the Government in the indictment. Both Carminati and McKenney were shown to have participated actively in transactions between Russano and his customers. In addition, there was ample evidence from which the jury could believe that Carminati and Galgano each supplied heroin to the Russanos on more than one occasion. The circumstances, therefore, are unlike those in *United States* v. *Reina et al.*, 242 F. 2d 302 (2 Cir. 1957),

where evidence of a single sale by one Valachi was held insufficient to justify an inference that Valachi knew the sale was in execution of the larger venture which made up the conspiracy. Cf. *United States* v. *Ah Kee Eng*, 241 F. 2d 157 (2 Cir. 1957). In the present case, the evidence established that Carminati knew the Russanos intended to resell the heroin. There was other evidence, consisting of Galgano's admission to Botto that he supplied substantial quantities of heroin to Russano, which justified an inference that Galgano also knew that Russano intended to resell the heroin which he obtained from Galgano.[5]

In *United States* v. *Tramaglino*, 197 F. 2d 928 (2 Cir. 1952), a similar case, we stated:

> Here then we have evidence of several sales, at different periods, by Rosario and Tramaglino, of marihuana to the same group of buyers with knowledge on the part of the two suppliers that several conspirators were involved in the purchases and

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[5] Botto's testimony concerning this admission was as follows:

Q. And did you discuss narcotics with Galgano? A. I did.

Q. What did you say to Galgano and what did he say to you about narcotics? A. I told him that I was paying $400 an ounce for the stuff that he was giving to Ralph.

Mr. Fusco: That is objected to.

Q. Exactly what did you say to him, sticking as carefully as you can to the language of the conversation. A. I told him I was buying narcotics from Ralph and paying $400 an ounce, and that Ralph had told me "He was getting it from you."

He told me that when he gave the stuff to Ralph the stuff was all right.

Galgano's reply to Botto's statement that Galgano was the source of the heroin which Russano sold to Botto constitutes an admission by Galgano that he did, in fact, supply heroin to Russano. 4 Wigmore on Evidence, §1071 (3d Ed. 1940).

> that the purchases were for resale. This was enough, we think, to show that each appellant, as supplier, participated in, and acted to further the ends of, the conspiracy. It did not matter that neither had dealings with one another; each performed the same role at successive stages for the same ends. The overall conspiracy was the plan conceived by the intermediary group * * * to buy and resell marihuana at a profit. Both Rosario and Tramaglino knew and participated in this plan by furnishing the essential ingredient—the marihuana. In United States v. Bruno, 2 Cir., 105 F. 2d 921, 922, a case quite similar to this one, we said, in confirming a conviction of smugglers, middlemen, and retailers, for a single conspiracy to import and distribute narcotics illegally: "* * * the smugglers knew that the middlemen must sell to the retailers, and the retailers knew that the middlemen must buy of importers of one sort or another. Thus the conspirators, at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of the part with which he was immediately concerned, was dependent upon the success of the whole."

Since the evidence we have reviewed is sufficient to sustain the jury's verdict, we turn to the several contentions of the appellants that portions of that evidence were improperly admitted and that other errors occurred during the course of the trial.

The statement made by Galgano to Botto in October 1956, that he had supplied Ralph Russano with heroin, was admitted only against Galgano; and was properly so received as an admission by Galgano of his role in the conspiracy. 4 Wigmore on Evidence §1048 (3d Ed. 1940). Galgano, however, contends that the admission was not corroborated as required by *Opper* v. *United States*, 348 U. S. 84 (1954). We think that, with respect to Galgano, Russano's disclosure to Botto that Galgano was his supplier (provided this conversation is admissible), together with the Bankers Trust Company envelopes found in Galgano's possession, constitute sufficient independent evidence of participation in the conspiracy to corroborate Galgano's admission and thus to satisfy the requirements of the *Opper* case. Galgano further contends, however, that Russano's statement to Botto implicating Galgano was hearsay and was not admissible against him. We disagree with Galgano.

The declaration of a conspirator is admissible against a co-conspirator if there is independent evidence of the existence of the conspiracy, *Glasser* v. *United States*, 315 U. S. 60 (1942), and if the declaration is in furtherance of the conspiracy, *Krulewitch* v. *United States*, 336 U. S. 440 (1949). Galgano's admission, properly admitted whether or not it was corroborated, provided sufficient independent evidence of the existence of the conspiracy to satisfy the first requirement. We believe that Russano's statement to Botto naming Galgano as a source of supply from whom a better quality of heroin might be obtained, must be considered as in furtherance of the conspiracy. Botto was a regular customer of Russano. He complained to Russano

of the quality of the heroin which he was obtaining from the latter. Russano indicated that he could obtain pure heroin, and in response to Botto's question, stated that Galgano was the source of supply. We understand this statement to be further assurance that a better quality heroin was available and therefore in furtherance of the conspiracy to distribute narcotics.

Galgano's contention that the Bankers Trust Company envelopes were inadmissible at the trial is also without merit. Similar envelopes, shown to be connected with the conspiracy, had already been introduced into evidence. While Galgano had the right, which he exercised, of offering other explanations for his possession of the envelopes, the fact that this evidence, standing alone, might not have been sufficient to sustain a conviction did not affect its admissibility. It was relevant as bearing upon his connection with the conspiracy. Cf. *Sanders* v. *United States*, 238 F. 2d 145 (10 Cir. 1956).

The appellants Carminati and McKenney, relying on *Alford* v. *United States*, 282 U. S. 687 (1931), urge as ground for reversal that two witnesses for the Government, Oglesby and Schwartz, were excused from giving their addresses on cross-examination. In *Alford* the Supreme Court held that a witness may be cross-examined as to his residence because this information would enable the jury to identify the witness in his environment, might, under some circumstances, provide new avenues of exploration for defense counsel. With these factors in mind, we turn to the facts of the present case. With respect to Oglesby, the claim is frivolous. Appellants

obtained all the information about his residence that they asked of him. Nor is there any merit in their contention that they were erroneously denied knowledge of the residence of Schwartz. Schwartz was a witness for the Government and during his cross-examination counsel for one of the defendants questioned Schwartz about certain transactions occurring during June 1956. His question as to the address of the witness at that time was met by an objection from the Government which was sustained by the court. The only information which was elicited was that Schwartz resided in the Bronx. During the testimony of the very next witness, however, Schwartz's address was revealed. Under the circumstances of this case, we cannot find that the appellants were injured by the ruling curtailing Schwartz's cross-examination or that the ruling was reversible error. Schwartz had undergone thorough cross-examination. He had testified that he lived with his parents in the Bronx and he gave full details of past and present employment. His testimony further revealed that he had pleaded guilty and was awaiting sentence in the present case, that he had never before been an informer or witness for any prosecutor in a criminal case, that he had no previous criminal record, and that he did not use narcotics. This testimony gave the jury ample information with which to determine the credibility of the witness. Furthermore, although the next witness revealed Schwartz's address, defense counsel did not attempt to recall him or in any way seek to make use of this information.

Carminati seeks a reversal of his conviction because of an incident which occurred during the testimony of Botto.

Botto testified that he was arrested on the conspiracy charge and taken to the West Street jail. He related a conversation he had while there with Rich, a codefendant, in which Rich stated that Carminati was Ralph Russano's connection. Counsel objected to the testimony. The court ordered it stricken and instructed the jury to disregard it. If the testimony had remained in evidence, Rich's participation in the conspiracy having ended with his arrest, *Graham* v. *United States*, 15 F. 2d 741 (8 Cir. 1926), reversal would be required. *Krulewitch* v. *United States, supra:* But counsel for Carminati did not object to the question put to Botto, and, consequently, the answer was received before objection was made. The testimony was stricken as soon as counsel made known his objection, the trial court then proceeding at once to protect the defendant's rights. No error was committed.

Other issues raised by Carminati and McKenney deserve only brief mention. Both object to the charge of the trial court that "constructive possession" of a narcotic drug is sufficient to raise the presumption created by 21 U. S. C. §174. However, the charge was contained in that portion of the instructions which dealt with the substantive counts against another defendant not involved on this appeal and did not deal with the conspiracy. Under these circumstances, even if the charge was erroneous, as to which we express no opinion, the appellants would have no ground for complaint.

Carminati assigns as error that portion of the trial court's summation of the evidence dealing with Oglesby's testimony. The trial court, in an unqualified statement, re-

ferred to Carminati as the man whom Oglesby had identified as being involved in a certain transaction. Carminati contends that Oglesby had testified only that Carminati resembled the man whom he had seen, but on the whole record it is clear that the trial court was correct in its summation.

Nor was there error in the refusal of the trial court to provide the jury with a full set of the minutes. We have previously recognized that this is a matter within the discretion of the trial court, *U. S.* v. *Rosenberg*, 195 F. 2d 583 (2 Cir. 1952). Moreover, it is evident from the record that in the present case the jury obtained all of the information which it had requested.

Other errors alleged by the appellants to have been committed during the course of the trial have been considered by us, but they are without merit and do not warrant discussion.

Judgments affirmed.